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Supreme Court of the United States

October Term, 1933

No. [redacted] 28

ROBERT C. GILLIS, as Receiver of Western Oil and Refining Company,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Supreme Court of the United States

OCTOBER TERM, 1933

No.....

ROBERT C. GILLIS, as Receiver of Western Oil and Refining Company,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI *

To The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Robert C. Gillis as receiver of Western Oil and Refining Company, a corporation, prays for the allowance of a Writ of Certiorari to review a decree of the United States Circuit Court of Appeals for the Ninth Circuit, filed March 19th, 1934, reversing an order and decree of the District Court of the United States for the Southern District of California in favor of petitioner. Said decision of the Circuit Court of Appeals has not yet appeared in the official reports but is included in the Transcript of Record (pages 51 to 56) heretofore filed in this Court and upon which this petition is based.

* All italics, capital and bold face type are petitioner's, and are used for emphasis only.

THE QUESTION PRESENTED

Are certain provisions of the California state gasoline tax statutes *valid*, and within the purview of Section 65 of Federal Judicial Code (28 U. S. C. A. Sec. 124) *when interpreted* as prohibiting a federal equity receiver duly appointed by the United States District Court in California from operating the properties of an oil company, for conservation of assets, without a license from the State of California procurable only upon conditions with which is it factually impossible for such receiver to comply—namely, the giving of bond by said receiver with corporate surety or, in lieu thereof, the deposit of cash or securities with said State to guarantee unconditionally the payment by said receiver of State gasoline taxes subsequently to accrue during his operations under direction of said United States District Court?

SUMMARY OF FACTS

Robert C. Gillis was appointed and qualified as receiver of Western Oil and Refining Company on or about April 4th, 1931, in Equity Case No. T-89-M, entitled Olaf Halvorson, Complainant, vs. Western Oil and Refining Company, Defendant, in the United States District Court for the Southern District of California, Central Division, which was an uncontested receivership for conservation of assets having a value of three million dollars (Record p. 5). Under direction of the District Court, the receiver has ever since operated the properties and carried on business and is still doing so pending the outcome of this proceeding. The assets have not deteriorated (Record p. 14).

When the receiver first qualified he procured a bond with corporate surety in the penal sum of $100,000.00, in favor

of the State of California, to guarantee the payment to said State of all state gasoline taxes which might thereafter accrue against him as receiver; and thereupon the California State Board of Equalization issued a license to said receiver to operate in California (Record p. 9); all of which was done voluntarily by the receiver and in accordance with the provisions of the California gasoline tax legislation now known as the Motor Vehicle Fuel Tax Law (Statutes and Amendments to the Codes of California 1931, Chapter 85 at page 105; Ibid. Chapter 86, p. 119; Ibid. Chapter 793, p. 1652; Ibid. Chapter 997 p. 2001; Ibid. Chapter 1082 p. 2288; Statutes and Amendments to the Codes of California 1933, Chapter 631, p. 1631; Sec. 1056 California Code of Civil Procedure) printed as an Appendix to this petition.

All California gasoline taxes accruing against the receiver were promptly paid as and when the same became due, such taxes so paid amounting in the aggregate up to June 7, 1933, when this proceeding was instituted, to $1,390,051.33 (Record p. 13).

Notwithstanding the total absence of any loss, direct or indirect, by the surety for the receiver, said surety nevertheless withdrew and cancelled its bond on June 28th, 1933 (Record p. 10); and thereupon it became *absolutely impossible* for the receiver to procure any corporate surety on such bond (Record pp. 27 and 30) qualified under Section 1056 of the California Code of Civil Procedure which was the only kind of surety the State of California would or could accept under said gasoline tax legislation (Record p. 7), although powerless to compel any surety to execute any such bond (Record p. 12).

Prior to the effective date of withdrawal by said corporate surety from the receiver's bond, he applied to the District Court for instructions whether to proceed with his operations or liquidate (Record p. 17). A hearing on such application was had on June 19, 1933 and thereat the State of California voluntarily appeared and opposed the giving of any instructions to said receiver to continue operations after withdrawal of said surety on the receiver's bond unless a new surety be procured or, in lieu thereof, the receiver deposit cash or securities with the State for the same purpose in strict compliance with the terms of said California gasoline tax legislation (Record p. 29). Evidence was adduced at said hearing upon which the District Court found that ALL THE ALLEGATIONS OF THE RECEIVER'S APPLICATION (Record p. 4) FOR INSTRUCTIONS WERE TRUE; that the production and marketing of gasoline in California by the receiver was (Record p. 30)

> "and now is absolutely necessary and vital to, and the principal activity in, the operations of said Receiver;"

that cessation thereof would necessarily terminate the receivership, although the record failed to show any facts justifying such termination; that (Record p. 31)

> "the State of California will not be subjected to any unreasonable hazard or danger of loss from a continuance of said receivership without bond or other security given by said Receiver for payment of gasoline taxes to said State but with payment of such gasoline taxes hereafter accruing from the operations of said Receiver to be made at the corresponding times and in the same manner in which such taxes have been paid since the

> inception of the receivership; AND THAT THE PURPOSES AND OBJECTS OF THE RECEIVERSHIP CANNOT OTHERWISE BE ACCOMPLISHED."

And thereupon the District Court, by its order dated June 26, 1933 (Record p. 24), instructed the receiver to continue to pay all gasoline taxes accruing to the State of California in the same manner as before withdrawal of said surety from the receiver's bond but, nevertheless, to operate without bond to, or license from, the State of California until further order of the Court. The State appealed.

The Circuit Court of Appeals for the Ninth Circuit reversed the United States District Court and thereby answered in the affirmative the question presented, saying (Record p. 55):

> "But compliance by a receiver with the state statute is a condition precedent to his right to engage in the business referred to; and if the receiver cannot comply therewith we think the estate should be liquidated and the receivership closed."

REASONS FOR ALLOWANCE OF THE WRIT

The receiver of Western Oil and Refining Company brings this petition for writ of certiorari under Rules 38 and 39 of this Court and contends that the decision of the Circuit Court of Appeals should be reviewed because:

1. There is involved an important question of federal law which has not been, but should be, settled by this Court; namely, the question whether the heretofore undoubted power and jurisdiction of the United States District Court to have its receivers operate oil companies in California for conservation of assets without permission of the State can be, or has been,

abolished or diminished by the California gasoline tax statutes construed in juxtaposition with Section 65 of the Federal Judicial Code.

2. The Circuit Court of Appeals has decided this federal question in a way probably in conflict with applicable decisions of this court.

3. Section 240 of the Federal Judicial Code (28 U. S. C. A. 347) gives this Court jurisdiction, if it were otherwise lacking, to issue its writ of certiorari and thereby to review said decision of the United States Circuit Court of Appeals for the Ninth Circuit, as prayed by the petitioner herein. The right of the receiver to bring this petition, if questioned, is supported by Bosworth, receiver vs. Terminal R. R. Assn., 174 U. S. 182.

A brief in support of this petition is appended hereto. The petitioner prays for issuance of the writ as hereinbefore asked.
Dated at Los Angeles, California,
this 16th day of April, 1934.

ROBERT C. GILLIS
As Receiver of Western Oil and
Refining Company, Petitioner.
GOUDGE, ROBINSON & HUGHES.
ERNEST C. CARMAN,
Attorneys for Petitioner,
210 West Seventh Street,
Los Angeles, California.

CERTIFICATE OF COUNSEL

We, Goudge, Robinson & Hughes and Ernest C. Carman, do hereby certify that we are attorneys for Robert C. Gillis as Receiver of Western Oil and Refining Company who brings the above and foregoing Petition for Writ of Certiorari which we have prepared for him; that in our opinion said Petition is well founded and that the same is brought upon our advice and counsel to the Petitioner and is not interposed for delay.

Dated at Los Angeles, California,
this 16th day of April, 1934.

GOUDGE, ROBINSON & HUGHES
ERNEST C. CARMAN,
Attorneys for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1933

NO.....

ROBERT C. GILLIS, as Receiver of Western Oil and Refining Company,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit*

STATEMENT OF CASE

The facts are stated in the Petition.

This case does NOT involve the nonpayment, or the refusal by the receiver to pay, gasoline taxes to the State of California in the same amount and at the same time that all other producers of gasoline in California pay the same. This case involves only the right of such receiver to operate without giving security in advance for the payment of such taxes subsequently to accrue, when the receiver is unable to give such security but the court appointing him deems continuance of his operations essential to accomplish the purposes of the receivership.

* All italics, capital and bold face type are petitioner's, and are used for emphasis only.

Petitioner contends that, AS APPLIED TO THE FACTS OF THIS CASE, the provisions of the California gasoline tax statutes prohibiting the receiver from operating for conservation of assets as directed by the United States District Court in the exercise of its equity jurisdiction are unconstitutional and void and, therefore, not within the purview of Section 65 of the Federal Judicial Code (28 U. S. C. A. Sec. 124; Appendix hereto, page 1) which requires federal equity receivers to operate according to the *valid* laws of the State in which such operations are carried on (Record p. 54). This is so for three reasons:

1. The judicial power of the United States, including the power of the United States District Court in California to appoint this receiver and require him to operate the properties of Western Oil and Refining Company for conservation of assets, is wholly independent of State action; and the State of California cannot exert any authority in any form which directly or indirectly destroys, abridges, limits or renders inefficacious such power and jurisdiction of the United States District Court.

2. The provisions of the California gasoline tax legislation, interpreted as requiring this receiver to give a continuing bond or make a continuing deposit of cash or securities in the sum of $100,000.00 to insure payment of gasoline taxes of the State of California to accrue subsequently, are invalid because creating in effect an unlawful preference of the State of California over the United States in the collection of gasoline taxes and also subordinating all other expenses of receivership operations (including judicial costs and expenses) to the payment of gasoline taxes levied by the State of California.

3. The provisions of the California gasoline tax legislation when interpreted as requiring this receiver to give bond or deposit cash or securities in the sum of $100,000.00 to secure future payment of gasoline taxes, irrespective of the impossibility of compliance therewith by this receiver, are invalid as applied to the facts of this case whether generally so or not.

ASSIGNMENT OF ERROR

The Circuit Court of Appeals erred in holding and deciding, upon the facts of this case, that Section 65 of the Federal Judicial Code construed in juxtaposition with the California Motor Vehicle Fuel Tax Law deprived the United States District Court of the power to instruct and order Robert C. Gillis as receiver of Western Oil and Refining Company to continue his operations until the further order of the Court without license from, or the giving of bond to, the State of California.

ARGUMENT

The points above set forth will be considered in the order stated.

FIRST: AS TO THE SUPREMACY OF THE JUDICIAL POWER OF THE UNITED STATES OVER STATE LEGISLATION.

Section 65 of the Federal Judicial Code, first appearing in the Act of Congress of March 3, 1887 (24 Statutes at Large 552, Chapter 373), which the Circuit Court of Appeals has just now interpreted as prohibiting the production of gasoline by the receiver in California unless he is licensed so to

do by the State after giving bond or security for future payment of all gasoline taxes, has never before been held applicable to state laws restricting the power or jurisdiction of the federal courts. It cannot be denied that the United States District Court in California had the power and jurisdiction, at all times prior to enactment of the California gasoline tax act of March 30, 1931, to authorize and order any federal equity receiver to operate an oil company (or any other) for conservation of assets, including in such operations the production and sale of gasoline. And it cannot be denied that such power and jurisdiction of the federal court has been abrogated, if the decision of the Circuit Court of Appeals is correct, in all cases where the receiver is unable to give bond or put up security with the State for payment of gasoline taxes subsequently to accrue. That receivers will not be able to furnish such bond in cases where surety companies qualified under Section 1056 of the California Code of Civil Procedure are dominated by fear or caprice (or threats against such surety companies by the receivers' competitors are effective) naturally follows from the total inability of the State of California to compel any such surety company to execute any such bond even though there is no good reason for its refusal to do so. The alternative of the receiver—to put up cash or securities with the State in lieu of such bond—will usually be found impossible (as it was in this case) because the cash assets of the concern in receivership are naturally exhausted or diminished by its private managers before receivership in their efforts to avoid such calamity. A concern able to put up $100,000.00 in cash, or its equivalent in securities, will usually be found able to avoid receivership. Conversely, the depletion of its cash assets much

below such level of affluence is the usual cause of receivership. Another alternative open to the receiver is to pay the taxes weekly (thereby reducing the quantum of security required by the State) or to pay the same day by day *with a 100% penalty thereon.* (Statutes and Amendments to the Codes of California, 1931, Chapter 793, p. 1652. Appendix hereto page 37). But obviously a receiver cannot operate under such handicap in competition with other producers who pay their taxes only once a month.

Hence, the direct effect of the California gasoline tax act is to diminish greatly, if not to destroy entirely, the power and jurisdiction of the United States District Court to authorize or direct its receivers (however desirable in any particular case it may be) to operate any concern for conservation of assets if such operations include the production of gasoline. And if the State has the power to prevent a federal equity receiver from producing gasoline unless licensed so to do by the State after giving bond for the payment of gasoline taxes, then it inevitably follows that the State may similarly prohibit or restrict the production of any other commodity by federal equity receivers; or of all commodities—as in the event of a general sales tax requiring security in advance for payment thereof.

The Circuit Court of Appeals apparently has held that the State does have such power by virtue of Section 65 of the Federal Judicial Code. We think the applicable decisions of this Court are to the contrary. Among the first of such decisions is

Ex Parte Tyler
149 U. S. 164
(decided April 24, 1893)

from which we quote paragraph 6 of the syllabus in 37 L. Ed. 689 as follows:

"Where a sheriff of a county levied upon property in the possession of a receiver appointed by the U. S. circuit court, to collect state taxes, and continued to detain the property contrary to the order of the court, he is guilty of contempt of the court and liable to punishment therefor."

In the opinion at page 183 of 149 U. S. Reports (37 L. Ed. 695) we find this language:

"Ordinarily the court will not allow its receiver to be sued touching the property in his charge, nor for any malfeasance of the parties, or others, without its consent; and while the third section of the Act of Congress of March 3, 1887 (24 Stat. at L. 552, chap. 373) now permits a receiver to be sued without leave, it also provides that 'such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.' NEITHER THAT NOR THE SECOND SECTION, WHICH PROVIDES THAT THE RECEIVER SHALL MANAGE THE PROPERTY 'ACCORDING TO THE VALID LAWS OF THE STATE IN WHICH SUCH PROPERTY SHALL BE SITUATED,' RESTRICTS THE POWER OF THE CIRCUIT COURTS TO PRESERVE THE PROPERTY IN THE CUSTODY OF THE LAW FROM EXTERNAL ATTACK.

* * * * * * * *

"The general doctrine that property in the possession of a receiver appointed by a court is in custodia legis, and

that unauthorized interference with such possession is punishable as a contempt, is conceded; but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly property so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, but this does not justify a physical invasion of such custody and a wanton disregard of the orders of the court in respect of it. The maintenance of the system of checks and balances characteristic of republican institutions requires the co-ordinate departments of government, whether Federal or state, to refrain from any infringement of the independence of each other, and the possession of property by the judicial department cannot be arbitrarily encroached upon, save in violation of this fundamental principle.

"The levy of a tax warrant, like the levy of an ordinary fieri facias, sequestrates the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face."

We think the California gasoline tax act, in so far as it requires a federal equity receiver to set apart and deliver in advance to the State or a surety company $100,000.00 of receivership assets to guarantee payment of gasoline taxes to accrue, is at least as objectionable as the South Carolina laws under which Sheriff Tyler attempted to collect taxes on property in the custody of a federal equity receiver in the above cited case. And the reasoning of the case is equally applicable here.

No statement of the immunity of federal judicial power from state legislation or restraint has ever been made more clearly than by Chief Justice White in Harrison v. St. Louis etc. Ry. Co., 232 U. S. 318 (decided February 24, 1914) where at page 329 he said for the Court:

> "It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority is a power wholly independent of state action, AND WHICH THEREFORE THE SEVERAL STATES MAY NOT BY ANY EXERTION OF AUTHORITY IN ANY FORM, DIRECTLY OR INDIRECTLY, DESTROY, ABRIDGE, LIMIT OR RENDER INEFFICACIOUS. THE DOCTRINE IS SO ELEMENTARY AS TO REQUIRE NO CITATION OF AUTHORITY TO SUSTAIN IT. Indeed, it stands out so plainly as one of the essential and fundamental conceptions upon which our constitutional system rests, and the lines which define it are so broad and so obvious, that, unlike some of the other powers delegated by the Constitution, where the lines of distinction are less

clearly defined, the attempts to transgress or forget them have been so infrequent as to call for few occasions for their statement and application."

The decision last above cited dealt primarily with the removal of causes from state to federal courts. There are other decisions of the same tenor; and subsequent in date to the enactment of the Act of Congress of March 3, 1887, from which Section 65 of the Federal Judicial Code was taken. While none of these decisions primarily deal with facts similar to those in the case at bar, nevertheless the principles of law announced in such decisions seem clearly applicable here. In

Mississippi Mills v. Cohn,

150 U. S. 202

37 L. Ed. 1053

(decided Nov. 13, 1893)

we quote paragraphs 1 and 2 of the syllabus as follows:

"1. The jurisdiction of the Federal courts, sitting as courts of equity, is neither enlarged nor diminished by state legislation.

"2. The equity jurisdiction conferred on the Federal Courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union."

An attempt to subject to the probate laws of a State the property of a decedent that had been seized under process of a federal court met with disaster under the same rule of federal law in the case of

Rio Grande Railroad Company vs. Gomila,

132 U. S. 478

33 L. Ed. 400 (decided December 9, 1889)

in which the controlling principle was stated in the second paragraph of the syllabus reading as follows:

> "The jurisdiction of a court of the United States, once obtained over property by its being brought within its custody, continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the State, or by any proceedings subsequently commenced in a state court."

In the case at bar the State of California at no time has challenged or questioned the finding of the District Court (Record p. 31), in support of its instruction to the receiver to continue operations notwithstanding his inability to give bond or security to the State for payment of gasoline taxes, that

> "the purposes and objects of the receivership cannot otherwise be accomplished."

Nor has the State of California at any time questioned the general desirability of this receivership, or attacked the same for any reason other than the production of gasoline by the Receiver without maintaining in force his bond to the State for payment of the taxes thereon or posting cash or securities in lieu thereof as provided in the California gasoline tax act.

It has been held that, while a State may exact a gasoline tax generally, it cannot do so if its payment is made a condition precedent to the taxpayer's right to carry on interstate or foreign commerce. In

Bowman v. Continental Oil Co.,
256 U. S. 642
65 L. Ed. 1139

it is said at page 648:

> "No doubt the state might impose a license tax upon the distribution and sale of gasoline in domestic commerce *if it did not make its payment a condition of carrying on interstate or foreign commerce.*"

The same principle applies to the attempt of the State of California, if it be such, to make the payment—or, what is worse, the giving of bond for future payment—of gasoline taxes a condition precedent to the right of a federal equity receiver to operate or of a federal court to authorize such operation. The right of a private person to engage in interstate commerce is not more important, nor better protected by the federal constitution, than the equity jurisdiction of the federal courts. Neither can be taken away by any taxing statute of the State of California.

Moreover, the receiver in the case at bar is and has been engaged in interstate commerce to some extent (Record p. 16).

We believe that a federal equity receiver operating under orders of a United States District Court is not less dignified, nor less clothed with immunity from interference by state authorities, than the driver of a mail cart for the postoffice department of the United States. Hence we quote from

Johnson v. Maryland
254 U. S. 51
65 L. Ed. 126

the second paragraph of the syllabus (in L. Ed.) as follows:

> "2. A state may not require a postoffice employee to cease driving a government motor truck in the transportation of mail over a post road until he shall obtain a

license by submitting to examination before a state official and paying a fee."

In the opinion, after reviewing the authorities, the Supreme Court said (254 U. S. 56):

"A little later the scope of the proposition as then understood was indicated in Osborn v. Bank of the United States, 9 Wheat. 738, 867, 6 L. Ed. 204, 234: 'Can a contractor for supplying a military post with provisions be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative.' In more recent days the principle was applied when the governor of a soldiers' home was convicted for disregard of a state law concerning the use of oleomargarine, while furnishing it to the inmates of the home as part of their ration. It was said that the Federal officer was not 'subject to the jurisdiction of the state in regard to those very matters of administration which are thus approved by the Federal authority.' Ohio v. Thomas, 173 U. S. 276, 283, 43 L. Ed. 699, 701, 19 Sup. Ct. Rep. 453. It seems to us that the foregoing decisions establish the law governing this case."

The Circuit Court of Appeals for the Seventh Circuit appears to disagree in principle with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case at bar.

In Crawford v. Duluth Street Railway Company, 60 Fed. 2nd, 212, it appeared that a federal receiver of a street railway company operating in Superior, Wisconsin, was absolutely prohibited by Wisconsin statutes from abandoning any

branch line without consent of the City Council which had been refused. The receiver applied to the federal court of his appointment for leave to abandon certain branch lines and for the instructions of the court in the premises; setting forth that a continuance of operations on such branch lines would be confiscatory. The federal court granted leave to abandon *notwithstanding Wisconsin statutes to the contrary*; and this was affirmed by the Circuit Court of Appeals for the Seventh Circuit in the above cited decision where the court said, among other things:

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"Apellants assert that the District Court was without jurisdiction to hear the petition and grant relief thereon. With this we cannot agree. The property had been drawn into custody and control of the court. The receiver was entitled to the instructions of the court as to its operation. *The city and the state having intervened, it was proper for the court to determine the questions of confiscation presented.* The controversy had relation to the property in the custody of the court, and, in justice to the parties before the court, ought to be determined in the principal proceeding. Central Union Trust Co. v. Anderson County et al., 268 U. S. 93, 96, 45 S. Ct. 427, 69 L. Ed. 862; Hoffman v. McClelland, 264 U. S. 552, 558, 44 S. Ct. 407, 68 L. Ed. 845. The court, of course, in giving instructions to the receiver, is bound by the federal statute which requires the receiver to manage and operate the property according to the valid laws of the state in which such property is situated, in the same manner that the owner would be bound to do if in possession thereof.

24 Stat. 554, § 2, Jud. Code § 65 (U. S. Code Ann., title 28, § 124.)"

* * * * * * * *

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"Conceding the force of the above decisions and admitting the right of the receiver to abandon the entire system, appellants invoke the Wisconsin statute which forbids the abandonment of any part of a street railway without the consent of the city."

* * * * * * * *

"[5] Was the action of the city council of Superior in withholding consent to the abandonment of the branch lines arbitrary and unreasonable? And does the enforcement of the Wisconsin statute amount to confiscation of the property in the hands of the receiver? The regulatory power conferred on the city council by the statute is subject to the limitation that the order must not be unreasonable. The showing of the receiver is that the entire system has been operated at a loss for more than ten years. The loss has increased year by year, caused by a steady decrease in revenue passengers and in passenger revenue. This is accounted for by the large and steadily increasing use of private automobiles. In the opinion of experts in street railway operation a reduction of service would not remove the loss. Various increases in fare rate over a number of years have not increased but have lessened passenger revenue. The loss was traced to the three branch lines. By discontinuing that service it is possible to operate the remainder. If the branches are not abandoned the whole system is lost."

"[6] We think that the case does not fall within the rule of Fort Smith Light & T. Co. v. Bourland, supra; and that upon the facts averred and proved the action of the city council, particularly in view of the requirement that adequate bus service shall be maintained, must be held to be unreasonable, and the enforcement of the regulatory statute in the circumstances found to amount to a deprivation of rights protected by the Constitution. As stated in State of Iowa v. Old Colony Trust Co. (C. C. A.) 215 F. 307, 313, L. R. A. 1915A, 549, '*They cannot force a railroad company to do the impossible.*' "

Garnishment statutes of the states have been held inapplicable to federal equity receivers.

Republic Supply Co. v. Del Rey Oil
and Refining Company
50 Fed. 2nd 639

Central Trust Co. v. Wheeling & Lake Erie R. R. Co.
189 Fed. 82

Prohibitive sections of the Federal Judicial Code, such as Section 265 prohibiting federal injunctions against proceedings in state courts, have been held inapplicable where the jurisdiction of the federal court would be diminished if the statute were applied.

Looney, Atty. Gen. v. East Texas R. R. Co.
247 U. S. 214

Swift v. Black Panther Oil Co.
244 Fed. (C. C. A. 8) 20

We submit that the foregoing justifies and demonstrates the advisability of a review by this Court, on writ of certiorari,

of the decision of the Circuit Court of Appeals for the Ninth Circuit in the case at bar to the end that the judicial power of the United States may be correctly expounded.

SECOND: **AS TO THE INVALIDITY OF CALIFORNIA'S CLAIM TO PREFERENCE OVER THE UNITED STATES IN THE COLLECTION OF GASOLINE TAXES, AND OVER THE COURT ITSELF IN RESPECT TO JUDICIAL COSTS AND EXPENSES OF ADMINISTRATION OF THE RECEIVERSHIP ESTATE.**

We quote paragraph 10 of the syllabus to Wolf v. De Wolf & Co., Inc., 53 Fed. 2nd, 999 (C. C. A. 7th Circuit) as follows:

> "Taxes for period in which receiver is in possession may be classed as costs of administration."

To show further that taxes accruing to a State during receivership operations are merely "expenses of administration" we cite the case of

Michigan v. Michigan Trust Co.,
286 U. S. 334,
76 L. Ed. 1137

from which we quote this language of Justice Cardozo, speaking for the Court at page 344 of 286 U. S., to wit:

> "Viewing the receivership in its true light as one, not to wind up the corporation, but to foster the assets, we think the annual taxes accruing while the receiver was in charge must be deemed expenses of administration and therefore charges to be satisfied in preference to the claims of general creditors."

This very late decision having established *at most* that taxes accruing during receivership are but "expenses of administration," can the State of California prohibit a federal receiver from operating at all unless and until he first gives a bond to the State of California to pay such "expenses of administration" in the federal court that appointed him and to which, alone, he is accountable for the due payment of "expenses of administration" of the receivership?

Let us see how that would affect the interests of the United States, to say nothing of others.

By the Revenue Act of 1932, Section 617 (Act of June 6, 1932; 47 Stat. at L. chap. 209; Title 26 U. S. C. A. chap. 25) the Congress imposed a federal gasoline tax of one cent per gallon on all gasoline produced in the United States. The Receiver of Western Oil and Refining Company, ever since the effective date of said Act of Congress, has been paying and necessarily will continue to pay such federal gasoline tax. Can the State of California compel the receiver to take out of the assets of the receivership estate the sum of $100,000.00 and deliver the same (directly or indirectly) to the State as a guaranty that its gasoline taxes will be paid while the United States is left to look only to the general assets of the receivership estate for collection of its gasoline taxes in the untoward event of bankruptcy or liquidation in equity of Western Oil and Refining Company? We find an answer to this query in

People of the State of New York vs. Mark M. Maclay and Charles E. McWilliams, Receivers of McWilliams Bros. Inc.,
77 L. Ed. 754
288 U. S. 290

from which we quote the entire syllabus as follows (L. Ed.):

"1. A consent decree appointing a receiver for a corporation has the effect of a general assignment within the meaning of Rev. Stat. § 3466 (U. S. C. title 31, § 191), giving the United States priority in payment out of assets.

"2. Congress may give priority to debts due to the United States though the debts thereby subordinated are due to a state or its political subdivisions.

"3. *A state whose lien for unpaid taxes is not perfected until after the appointment of a receiver for a corporation cannot win itself a preference over debts due the United States by anything done thereafter.*

"4. The lien created by a statute making a franchise tax payable by a corporation a lien upon its property until paid is, though the amount is undetermined by assessment, effective as to mortgages or purchasers.

"5. The lien created by a statute making a franchise tax a lien upon the property of a corporation until paid is superior, at all events after assessment, to mortgages already made, and will thus prevail against a purchaser on foreclosure.

"6. The statutory preference given debts due the United States by Rev. Stat. §3466 (U. S. C. title 31, §191), prevails against a state's claim against an insolvent corporation in the hands of a receiver for franchise taxes due prior to, but not assessed or liquidated until after, the receivership, even where a state statute declares such taxes to be a lien upon the property of the corporation until paid."

We find it difficult to believe that this Court will approve as *valid* (within the meaning of Section 65 of the Federal Judicial Code) a state statute giving, in effect, a preference to the State of California over the United States in the payment of gasoline taxes levied by both of these taxing powers, even if there were no question of infringement on the jurisdiction of the federal courts involved.

THIRD: AS TO INVALIDITY OF THE DISPUTED PROVISIONS OF THE CALIFORNIA GASOLINE TAX LEGISLATION WHEN APPLIED TO THE FACTS OF THIS CASE.

The United States District Court below perhaps purposely refrained from writing any opinion upon the general invalidity of the licensing provisions of the California gasoline tax legislation as applied to federal equity receivers because it was only necessary to hold the same invalid in respect to this receiver who could not comply therewith and, unless protected by the court of his appointment, must cease receivership operations that were and are essential to the conservation of assets and the general purposes of the receivership. The minimum duty of the court below in such circumstances appears to have been rightly performed. In the recent case of

Mintz v. Baldwin,

2 Fed. Supplement 700

it was held that

> "Statute may be constitutional as applied to one set of facts and unconstitutional as applied to another, though unconstitutional portion results from general prohibitory language in single clause."

Under this principle the provisions of the California gasoline tax acts, interpreted (wrongly, we think) as requiring the receiver in the instant case to give bond or security to the State for payment of taxes to accrue notwithstanding his inability to get such bond or deposit such security, may be held invalid *on the facts of this case* whether generally invalid or not. And such was the effect of the order of the District Court instructing the receiver to continue his operations without bond to, or license from, the State of California until the further order of said court.

On the facts of this case, the State was subjected to no undue risk of loss. The receiver's possession of assets of the appraised value of three million dollars in the custody of the law and under the control of the federal court, coupled with the recognition by that court of the right of the State to receive its gasoline taxes as an expense of administration which the receiver was instructed by the court to pay at the same times and in the same manner as other producers pay, all taken together afforded the State in truth and in fact at least as much security as a $100,000.00 bond given by any producer of gasoline under private management and free to dissipate its assets other than such as were specifically pledged to secure the State. In the case at bar the entire receivership estate is already pledged (in a sense at least), along with the integrity of the court, to the payment of the expenses of administration among which the State's gasoline taxes accruing against the receiver are recognized as prior to all other expenses of administration except judicial costs and debts (gasoline taxes) owing to the United States.

The District Court should have been upheld; or, at least the decision of the Circuit Court of Appeals to the contrary should be reviewed by this Court on certiorari.

CONCLUSION

The California gasoline tax statutes, when interpreted and applied so as to require the receiver in the case at bar to do the impossible or to cease operating in California notwithstanding the judgment of the United States District Court that such operations should continue and its finding that the purposes of the receivership cannot otherwise be accomplished, are unconstitutional and void. Consequently, Section 65 of the Federal Judicial Code is inapplicable; and the decision of the Circuit Court of Appeals should be reviewed and reversed in this Court. Hence, its writ of certiorari to that end should now be issued.

Dated April 16, 1934.

Respectfully submitted,

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APPENDIX

TO PETITION OF ROBERT C. GILLIS AS RECEIVER OF WESTERN OIL AND REFINING COMPANY TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI TO REVIEW A DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT RENDERED MARCH 19, 1934, IN CASE NO. 7286.

Section 65 of the Federal Judicial Code (Title 28 U. S. C. A. Sec. 124; Act of Congress of March 3, 1887, 24 Stat. at L. 552, chap. 373, Sec. 2) is as follows:

"Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than $3,000 or imprisoned not more than one year, or both."

The California Gasoline Tax Legislation now in force and in force at the time the District Court of the United States for the Southern District of California, Central Division, made its order of June 26, 1933, instructing Robert C. Gillis as Receiver of Western Oil and Refining Company (Equity Case No. T-89-M in said court) to continue his operations, including the production of gasoline, notwithstanding withdrawal of the surety on his bond to the State for payment of gasoline taxes, has been compiled and published officially in pamphlet

form by the State Board of Equalization, which publication (omitting historical foot-notes, etc.) is here reproduced in full as a complete compilation of the statutes of California relating to taxation of gasoline or motor vehicle fuel, to wit:

"Motor Vehicle Fuel Tax Law

Title.—*An act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, requiring the licensing of producers and manufacturers of casing-head gasoline, kerosene distillates or other petroleum products used in or which may be used in the blending, compounding or manufacturing of motor vehicle fuel, and of brokers, jobbers and wholesaler merchants dealing in petroleum products, requiring the execution and delivery by distributors of a surety bond upon application for license, providing for the collection and disposition of license taxes, declaring unlawful the withholding from export of motor vehicle fuel obtained for export, the diversion of motor vehicle fuel from interstate transit, or the improper return of motor vehicle fuel previously exported, prescribing penalties for violation of the provisions of this act, and repealing all acts and parts of acts inconsistent herewith.*

(Approved May 30, 1923. Stats. 1923, p. 571; in effect September 30, 1923. Amended by Stats. 1925, p. 659; Stats. 1927, p. 1308; Stats. 1929, pp. 112, 1551; Stats. 1931, pp. 105, 1652, 2001, 2288; Stats. 1933, Ch. 631.)

SECTION 1. The following words, terms and phrases shall, whenever used in this act, have the meaning set forth in this section.

(a) **"Motor vehicle"** shall mean and include every self propelled vehicle operated or suitable for operation on the highway.

(b) **"Motor vehicle fuel"** shall mean and include gasoline, natural gasoline, and any inflammable liquid, by whatever name such liquid may be known or sold, which is used or is usable for propelling motor vehicles operated by the explosion type of engine; provided, however, that kerosene shall not be considered motor vehicle fuel for the purposes of this act.

(c) **"Distributor"** shall mean and include every person, firm, association or corporation refining, manufacturing, producing, blending, or compounding motor vehicle fuel in this State and, within the meaning of section 7 of this act, distributing such fuel; also every person, firm, association or corporation importing any motor vehicle fuel into this State and, within the meaning of section 7 of this act, distributing such fuel in this State, whether in the original package or container in which it is imported or otherwise than in such original package or container; also every person, firm, association or corporation who, having acquired in this State in the original package or container motor vehicle fuel which has been imported into this State, shall, within the meaning of section 7 of this act, distribute such fuel, whether in such original package or container in which the same was imported or otherwise than in such original package or container.

(d) **"Producer"** shall mean and include every person, firm, association or corporation, other than a distributor, engaged in the business of producing or manufacturing any petroleum product or products used in, or which may be used in, the blending, compounding or manufacturing of motor vehicle fuel, provided, however, that crude oil which must be refined before it may be used in such blending, compounding or manufacturing shall not be considered a petroleum product within the meaning of this definition.

(e) **"Broker"** shall mean and include every person, firm, association or corporation, other than a distributor, engaged in business as a broker, jobber or wholesale merchant dealing in motor vehicle fuel or any petroleum product or products used in or which may be used in the blending, compounding or manufacturing of motor vehicle fuel; provided, however, that crude oil which must be refined before it may be used in such blending, compounding or manufacturing shall not be considered a petroleum product within the meaning of this definition.

(f) **"Service station"** is a place operated primarily for the purpose of delivering motor vehicle fuel into the fuel tanks of motor vehicles. [Statutes 1933, Chapter 631; in effect May 29, 1933.]

SEC. 2. **Application for License. Bond Required.** Every distributor before April 1, 1931, and after this act becomes effective every person, firm, association or corporation before becoming a distributor shall make an application to the State Board of Equalization for a license authorizing such distributor, person, firm, association or corporation to engage in business as a distributor. Applications for such licenses must be made to the State Board of Equalization on forms to be prescribed, prepared and furnished by said board. It shall be unlawful from and after April 1, 1931, for any person, firm, association or corporation to be a distributor without first securing from the State Board of Equalization a license for which provision is made in this section. Before granting any license authorizing any person, firm, association or corporation to engage in business as a distributor, the State Board of Equalization must require such person, firm, association or corporation to file with

said board, in such form as shall be prescribed by said board, a bond duly executed by such person, firm, association or corporation as principal and a corporation such as is mentioned in section 1056 of the Code of Civil Procedure of this State, as surety, payable to the people of the State of California, conditioned upon faithful performance of all the requirements of this act and expressly providing for the payment of all license taxes, penalties and other obligations of such person, firm, association or corporation arising out of this act.

Amount of Bond. Weekly Payments. The total amount of the bond or bonds required of any distributor shall be fixed by the State Board of Equalization and may be increased or reduced by said board at any time subject to the limitations herein provided. In fixing the total amount of the bond or bonds required of any distributor, the State Board of Equalization must require a bond or bonds equivalent in total amount to twice his estimated monthly license tax determined in such manner as said board may deem proper; provided, however, that, subject to such terms and conditions as the State Board of Equalization may prescribe, any distributor may undertake to pay on each Tuesday the license tax accruing on all of his distributions of motor vehicle fuel during the week ending the Saturday next preceding, and, if any distributor shall so bind himself, said board shall fix his bond or bonds in a total amount equivalent to twice the license tax accruing on account of his estimated weekly distributions determined in such manner as said board may deem proper; and further provided that the total amount of the bond or bonds required of any distributor shall never be less than one thousand dollars nor more than one hundred thousand dollars. No recoveries on any bond or any execution of any new bond shall invalidate any bond and

no revocation of any license shall affect the validity of any bond.

Deposit of Money in Lieu of Bond. In lieu of any such bond or bonds in total amount as fixed hereunder, any distributor may deposit with the State Treasurer, under such terms and conditions as said board may prescribe, a like amount of lawful money of the United States, or bonds or other obligations of the United States, the State of California, or any county or city and county of this State, of an actual market value not less than the amount so fixed by said board. All licenses issued to distributors under this section shall be valid until revoked by the State Board of Equalization.

Revocation of Licenses. Collection of Delinquent Taxes. Penalty. Nothing in this section shall be construed as relieving any distributor of the duty of filing the sworn monthly statement required by section 6 of this act. The assessment of any distributor who makes weekly payments shall be shown on the assessment roll prepared under said section 6 in the same manner as the assessments of other distributors are shown thereon, and the Controller shall apply such payments to the credit of such distributor on the assessment roll for the month during which the distributions covered by such payments were made. Whenever any distributor undertaking to pay his license tax in weekly installments, as provided in this section, shall fail to pay the full amount thereof in accordance with the terms and conditions prescribed by the State Board of Equalization, his license may be revoked forthwith, unless he complies immediately with the requirement of this section relating to the filing of a bond or bonds equivalent in total amount to twice the estimated monthly license tax. In the event of

nonpayment of any weekly installment of the license tax, or any part thereof, pursuant to the undertaking of any distributor, the full amount of the license tax accrued against such distributor shall become immediately due and payable and the Controller and the Attorney General shall proceed forthwith to collect the license tax due from such distributor in the manner prescribed by section 4 of this act with reference to delinquency in the payment of the monthly license tax. All provisions of said section 4 shall apply with full force and effect to collections required to be made under this section; provided, however, that the ten per cent penalty for delinquency for which provision is made under section 4 hereof shall accrue only as provided in said section, and there shall be added to any weekly installment of license tax remaining unpaid at five o'clock in the afternoon of the Tuesday following the close of such week, a penalty of five per cent on account of such delinquency; the accrual of any such penalty of five per cent shall not in anywise affect the ten per cent penalty for delinquency imposed under section 4 hereof, but such ten per cent penalty shall not be computed upon any amount added to such weekly license tax as a penalty under this section.

License Not Transferable. Discontinuance of Business. The license issued hereunder to any distributor shall not be transferable. Whenever a distributor ceases to engage in business as a distributor within the State of California by reason of the discontinuance, sale or transfer of such business, he shall give notice in writing thereof to the State Board of Equalization on or before the date of such discontinuance, sale or transfer. Such notice shall give the date of discontinuance

and, in the event of a sale or transfer of the business, the date thereof and the name and address of the purchaser or transferee. All taxes and penalties under this act, not yet due and payable under other provisions hereof, shall become due and payable concurrently with such discontinuance, sale or transfer, and the distributor shall forthwith make a report and pay all such taxes and penalties, and shall surrender to the State Board of Equalization the license theretofore issued. Unless such notice shall have been given as hereinbefore provided, such purchaser or transferee shall be liable for all taxes and penalties under this act accrued against the vendor or transferor to the date of such sale or transfer, but only to the extent of the value of the property and business thereby acquired.

Registration Required. Fee for Registration. Every producer and every broker before April 1, 1931, and thereafter every person, firm, association or corporation before becoming a producer or broker shall register as such with the State Board of Equalization and make application for a license on forms to be prepared and furnished by the State Board of Equalization. Each such application shall be accompanied by a registration fee of ten dollars.

Issuance of License. License Not Transferable. Disposition of Fees. Upon the receipt of the application of any such producer or broker, accompanied by such license fee, the State Board of Equalization shall issue to every such applicant a license to engage in such business from the date of the issuance thereof, until and including the following December 31st, and on or before January 1st, of each and every year and before any such producer or broker shall engage in business, an

application shall be filed and a license obtained for the calendar year. Any license so issued shall not be transferable and may be revoked by the State Board of Equalization as hereinafter provided. All registration fees collected under the provisions of this section shall be credited to the "Fuel tax enforcement fund" hereinafter created. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC. 2*a*. If any person, firm, association or corporation shall become a distributor without first securing the license required by section 2 of this act, the license tax shall be immediately due and payable on account of all motor vehicle fuel distributions made by such person, firm, association or corporation. The State Board of Equalization shall proceed forthwith to determine as best it may the amount of such distributions and such person, firm, association or corporation shall be estopped from complaining of the amount so determined. Said board shall assess immediately the license tax on account of such distributions, adding to such license tax a penalty of one hundred per cent for failure to secure the license. Said board shall file a certificate of such assessment with the State Controller who must proceed forthwith to collect the license tax due from such person, firm, association or corporation by seizure and sale of property in the manner prescribed in section 4 of this act with reference to delinquency of the payment of the monthly license tax. At the request of the Controller, the Attorney General shall commence and prosecute to final determination an action at law to collect the license tax and penalty, or any part thereof, assessed against any such person, firm, association or corporation. In any such suit the certificate of assessment made by the State Board of Equalization, or a copy

thereof certified by the Controller, shall be prima facie evidence that the person, firm, association or corporation is indebted to the people of the State of California in the amount of such license tax and penalties. It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken pursuant to this section shall relieve in any wise the person, firm, association or corporation from the penal provisions of section 14 of this act. [*Statutes* 1931, *p.* 1652; *in effect August* 14, 1931.]

SEC. 3. A license tax is hereby imposed for the privilege of distributing, within the meaning of section 7 of this act, any motor vehicle fuel. Said license tax shall be according to or measured by the gallonage of motor vehicle fuel so distributed in this State and shall be at the rate of three cents for each gallon of such fuel refined, manufactured, produced, blended or compounded by such distributor in this State and so distributed by him in this State, or imported by such distributor into and so distributed by him in this State otherwise than in the original package or container in which such motor vehicle fuel was imported into this State, and for each gallon of motor vehicle fuel imported into this State and thereafter acquired by such distributor in the original package or container in which the same was imported and thereafter so distributed by such distributor otherwise than in the original package or container in which the same was imported into this State.

From any amount found to be due upon any report hereunder the distributor shall first be allowed to deduct one per cent of the tax otherwise due hereunder to cover subsequent losses occasioned by evaporation and handling. [*Statutes* 1933, *Chapter* 631, *in effect May* 29, 1933.]

SEC. 4. License taxes herein required to be paid shall be payable in monthly installments to the State Controller for the month ending April 30, 1931, and each and every calendar month thereafter. The license tax shall be a lien upon all property of the distributor, attaching at the time of delivery or distribution subject to said license tax, having the effect of an execution duly levied against all property of the distributor, and remaining until the license tax is paid, or the property sold in payment thereof. The amount of such license tax for each month shall be paid on or before the first day of the second calendar month thereafter, and if not paid prior thereto, shall become delinquent at five o'clock in the afternoon of said day, and ten per cent penalty shall be added thereto for delinquency. In the event that any distributor is delinquent in the payment of his license tax hereunder, the Controller may give notice of the amount of such delinquency by registered mail to all persons having in their possession, or under their control, any credits or other personal property belonging to such distributor, or owing any debts to such distributor, at the time of receipt by them of such notice, and thereafter any person so notified shall neither transfer nor make other disposition of such credits, other personal property or debts until the Controller shall have given his consent to a transfer or disposition, or until twenty days shall have elapsed from and after the receipt of such notice. All persons so notified must, within five days after receipt of such notice, advise the controller of any and all such credits, other personal property or debts, in their possession, under their control or owing by them, as the case may be.

Seizure and Sale for Taxes. Whenever any distributor shall be delinquent in the payment of the license tax herein provided, the Controller or his duly authorized representative shall proceed forthwith to collect the license tax due from such distributor in the following manner: The Controller shall seize any property, real or personal, used by such distributor in the operation of his business, and thereafter sell at public auction such property so seized, or a sufficient portion thereof, to pay the tax due hereunder, together with any penalty or penalties imposed hereby for such delinquency, and any and all costs that may have been incurred on account of such seizure and sale.

Notice of Sale. Notice of such intended sale and the time and place thereof, shall be given to such delinquent distributor in writing at least ten days before the date set for such sale by enclosing a form of such notice in an envelope addressed to said distributor at his last known place of business in this State if any, and depositing the same in the United States mail, postage prepaid, and by publication for at least ten days before the date set for such sale in a newspaper of general circulation published in the county or city and county in which the property seized is to be sold; provided, however, that if there be no newspaper of general circulation in such county or city and county, then by the posting of such notice in three public places in such county or city and county for said ten day period. The said notice shall contain a description of the property to be sold, together with a statement of the amount of the taxes, penalties and costs, the name of the distributor, and the further statement that, unless such taxes, penalties and costs are paid on or before the time fixed in said notice for such sale, said

property, or so much thereof as may be necessary, will be sold in accordance with law and said notice.

Bill of Sale. Refund of Excess. At any such sale, the property shall be sold by said Controller or his duly authorized agent in accordance with law and said notice, and the Controller shall deliver to the purchaser a bill of sale for the pensonal property, and a deed for any real property so sold, and such bill of sale or deed shall vest title in the purchaser. The unsold portion of any property so seized may be left at the place of sale at the risk of the distributor. If, upon any such sale, the moneys so received shall exceed the amount of all license taxes, penalties and costs due the State from such distributor, any such excess shall be returned to the distributor, and his receipt therefor obtained. If, for any reason, the receipt of such distributor shall not be available, the Controller shall deposit such excess moneys with the State Treasurer, as trustee for such owner, subject to the order of such distributor, his heirs, successors or assigns.

Forfeiture of Bonds. The Controller must also immediately transmit notice of such delinquency to the Attorney General who shall at once proceed to collect all sums due to the State from any such distributor hereunder by bringing suit against the necessary parties to effect forfeiture of the bond or bonds of the distributor or of the money or securities deposited by the distributor with the State Treasurer in accordance with the terms of section 2 of this act, reducing any deficiency to judgment against the distributor.

Remedies Cumulative. It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken by the Controller or the Attorney General

shall be or be construed to be an election on the part of the State or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this act.

Assessment Roll as Evidence. In any suit brought to enforce the rights of the State hereunder the assessment roll prepared by the State Board of Equalization pursuant to section 6 of this act, or a copy of so much thereof as is applicable in such suit, duly certified by the Controller showing unpaid license taxes assessed against any distributor, shall be prima facie evidence of the assessment of the license tax, the delinquency thereof, the amount of the license tax, penalties and costs due and unpaid to the State, that the distributor is indebted to the people of the State of California in the amount of such license tax and penalties therein appearing unpaid and that all the forms of law in relation to the assessment and levy of such license tax have been fully complied with by all persons required to perform administrative duties under this act. [*Statutes* 1931, *p.* 109; *in effect March* 30, 1931.]

SEC. 5. **Distributors' Records.** Every distributor must keep a true and accurate record in such form as the State Board of Equalization may prescribe, of all stocks of petroleum products on hand, of all raw gasoline, gasoline stock, kerosene distillates, casing-head gasoline and other petroleum products used in, or which may be used in, compounding, blending or manufacturing motor vehicle fuel; of the amount of crude oil refined, the gravity of the crude oil refined and the yield from said crude oil, as well as of such other matters relating to transactions in petroleum products as said board may direct. Every distributor must take a physical inventory of the petro-

leum products on hand on the first day of every calendar month and must have the record of such inventory and of the other matters mentioned in this section, available at all times for the inspection of said board or its representatives. Upon demand of said board or its representatives every distributor must furnish a statement under oath reflecting the contents of any records to be kept under this section.

Producers' and Brokers' Records. Every producer must keep a true and accurate record in such form as the State Board of Equalization may prescribe of all manufacture and distribution of any petroleum product or products used in, or which may be used in, the blending, compounding or manufacturing of motor vehicle fuel, and every broker must likewise keep a true and accurate record of all purchases of motor vehicle fuel and such petroleum products in such manner as to disclose the vendor, the quantity purchased, the correct description of the commodity and the means of transportation to said broker, as well as all of the sales of motor vehicle fuel and such petroleum products in such manner as to disclose the vendee, the quantity sold, the correct description of the commodity and the means of transportation from said broker to the vendee. All such records required by this section must be available at all times for the inspection of said board or its representatives, who may require a statement or statements under oath at such intervals as said board may determine, reflecting the contents thereof. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC. 6. Each distributor shall on or before the fifteenth day of May, 1931, and on or before the fifteenth day of each and every month thereafter, file on forms prescribed, prepared

and furnished by the State Board of Equalization, a sworn statement showing the total number of gallons of motor vehicle fuel produced, refined, manufactured or compounded by such distributor within this State and sold during the preceding calendar month by such distributor within this State; the total number of gallons of motor vehicle fuel imported into this State by such distributor and sold or distributed within this State by such distributor during such month, when sold or distributed otherwise than in the original packages or containers in which imported into this State or used by such importer; also the number of gallons of such fuel acquired by him in the original package or container in which the same was imported into this State and thereafter sold, distributed or used by him; and such other information as the State Board of Equalization may require. If any distributor shall fail, neglect or refuse to file said report within the time prescribed by this section, the State Board of Equalization must note such failure, neglect, or refusal upon the tax roll hereinafter described, and must estimate the motor vehicle fuel distributions of said distributor, assessing the license tax thereon, adding to said license tax a penalty of fifteen per cent thereof for failure, neglect or refusal to report, and said distributor shall be estopped from complaining of the amount of said estimate. Said penalty for failure to report shall not be in lieu of the penalty for delinquency prescribed by section 4 of this act, but the penalty for delinquency shall not apply to or be charged against the penalty for failure to report. The State Board of Equalization shall, on or before the twenty-second day of May, 1931, and on or before the twenty-second day of each calendar month thereafter, assess the license tax due hereunder, and prepare

and complete an assessment roll showing the amount of the license tax assessed against each distributor, and immediately deliver said assessment roll to the State Controller. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC. 7. For the purposes of this act all motor vehicle fuel sold, donated, consigned for sale, stolen, bartered, used, or in any way voluntarily disposed of so as to terminate the ownership and possession thereof by the distributor plus one-ninety-ninth thereof, shall be deemed to be distributed; provided, however, that the exchange of motor vehicle fuel for motor vehicle fuel, gallon for gallon, shall not be considered a taxable distribution; and provided, that in lieu of the collection and refund of the tax on motor vehicle fuel used by a distributor in such a manner as would entitle a purchaser to claim refund under the provisions of section 11 hereof, credit may be given such distributor upon his tax return and assessment; and provided, further, that under such regulations as the State Board of Equalization may prescribe, sales and other deliveries of natural gasoline may be made to a duly licensed distributor free of tax.

Nothing in this act shall be construed as requiring the payment of the license tax herein specified upon more than one sale, distribution or transfer of the same motor vehicle fuel. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC. 8. It shall be unlawful for any distributor to fail, neglect or refuse to make and file any statement required by this act in the manner or within the time therein provided, or to make any such statement false in any particular. [*Original section; Statutes* 1923, *p.* 574.]

SEC. 9. If the license tax and such penalties as may have been incurred thereon chargeable to any distributor are not fully paid by the delinquent date specified in section 4 of this act, the Controller shall notify forthwith the State Board of Equalization, who must cite said distributor to appear within ten days before said board and show cause why his license under section 2 of this act should not be revoked, as prescribed by section 14 hereof. [*Statutes* 1931, *p.* 113; *in effect March* 30, 1931.]

SEC. 10. The provisions of this act requiring the payment of license taxes shall not be held on construed to apply to motor vehicle fuel imported into this State in interstate or foreign commerce and intended to be sold in the original and unbroken tank cars or other original receptacles, containers or packages and so sold while the same are in interstate or foreign commerce, nor to any motor vehicle fuel exported from this State by the distributor or delivered by the distributor to any vessel clearing from a port of this State for a port outside of this State and actually exported from this State in such vessel, nor to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government, but every distributor shall be required to report such exports and sales to the State Board of Equalization in such detail as that board may require, otherwise the exemption herein granted shall be null and void and all such fuel shall be considered distributed in this State subject fully to the provisions of this act.

Export Certificates. In support of any exemption from license taxes claimed under this section on account of the exportation of motor vehicle fuel, every distributor must execute

an export certificate in such form as shall be prescribed, prepared and furnished by the State Board of Equalization, containing a sworn statement, made by some person having actual knowledge of the fact of such exportation, that the motor vehicle fuel has been exported from the State of California, and giving such details with reference to such shipment as said board may require. All export certificates must be completed and on file in the office of the State Board of Equalization within forty-five days after the close of the calendar month in which the shipments to which they relate are made, and no certificate not completed and filed within such period shall be recognized for any purpose by the State of California or any agency thereof. The State Board of Equalization may demand of any distributor such additional data as are deemed necessary by said board in support of any such certificate, and failure to supply such data will constitute a waiver of all right to exemption claimed by virtue of such certificate.

Time for Making Exemption Claim. Any claim for exemption based on a sale to the United States government or any department thereof may be made by the distributor at any time within six months from the date of sale by filing such claim in the office of the State Board of Equalization, but no claim made after the expiration of said period of six months shall be recognized for any purpose by the State or any agency thereof. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC. 11. Any person, firm, association or corporation who shall buy and use any motor vehicle fuel for purposes other than in motor vehicles or export the same for use outside of this State, and who shall have paid any license tax for such

motor vehicle fuel hereby required to be paid, either directly or to the vendor from whom it was purchased, or indirectly by the adding of the amount of such license tax to the price of such fuel, shall be reimbursed and repaid the amount of such license tax paid by him or it upon presenting to the State Controller an affidavit supported by the original invoice or invoices showing such purchase, which affidavit shall be verified by the oath of the claimant and shall state the total amount of such fuel so purchased and that the claimant has paid the price thereof and the manner and the equipment in which the claimant has used the same; provided, however, that any motor vehicle fuel carried from this State in the fuel tank of a motor vehicle shall not be considered as exported from this State.

State Controller may Examine Records of Claimant. The State Controller, upon the presentation of such an affidavit and such invoice or invoices shall cause to be paid to such claimant, from the license taxes collected in accordance with the provisions of this act, an amount equal to the license taxes collected hereunder on such motor vehicle fuel; provided, however, that the State Controller shall have the right if he so desires, in order to establish the validity of any claim, to examine the books and records of the claimant for such purpose and the failure upon the part of the claimant to accede to such demand shall constitute a waiver of all right to the refund claimed on the account of the transactions questioned. Such examination may be made either through employes of the office of the State Controller or of the office of the State Board of Equalization.

Time for Filing Application for Refund. All such applications for refund based upon exportation of motor vehicle fuel from this State must be filed with the State Controller within

forty-five days from the date of exportation; all other application shall be filed within twelve months from the date of the purchase of such motor vehicle fuel. Any application filed after the times herein prescribed shall not be considered for any purpose by the State Controller, the State Treasurer or the State of California. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC 11*a*. Refund provisions contained herein shall not be construed to cover losses in handling, transporting or storage of motor vehicle fuel. [*Statutes* 1931, *p.* 1653; *in effect August* 14, 1931.]

SEC. 12. The State Board of Equalization shall have the power, and it is hereby authorized to make any and all such examinations of the records of distributors and such other investigations as it may deem necessary in carrying out the provisions of this act. If such examinations or investigations made by said board shall disclose that any reports of distributors of motor vehicle fuel theretofore filed with said board by said distributors pursuant to the requirements of this act, have shown incorrectly the amount of gallonage of motor vehicle fuel distributed or the tax accruing thereon, said board shall have the power, and is hereby authorized, to make such changes in subsequent assessments of said distributors under this act as it may deem necessary to correct the errors disclosed by its examination of the records of said distributors or its investigations as hereinbefore authorized.

The State Board of Equalization may appoint attorneys, accountants, auditors, investigators and such other expert and clerical assistance as it may from time to time deem necessary to enforce its powers and perform its duties under this act. [*Statutes* 1931, *p.* 115; *in effect March* 30, 1931.]

SEC. 13. **Motor Vehicle Fuel Fund Created. Expenses for Enforcement of Act.** All money received by the State Controller in payment of license taxes under the provisions of this act shall be by him deposited in the State treasury and credited to the "Motor vehicle fuel fund," which fund is hereby created. The moneys in said fund are hereby appropriated, subject to the provisions of any budget bill heretofore or hereafter enacted and section 661 of the Political Code, as follows:

(a) To pay the refunds authorized in this act.

(b) To the State Controller, to carry out any duties imposed upon him by this act.

(c) To the State Board of Equalization, to carry out any duties imposed upon it by this act, and the duties of said board arising out of the provisions of section 15 of Article XIII of the Constitution and legislation enacted pursuant thereto.

(d) To the counties of the State as hereinafter provided.

(e) To the State highway fund, as hereinafter provided.

(f) To pay the pro rata share of the overhead and general administrative expense of the State Controller and the State Board of Equalization attributable to duties imposed by this act or under the provisions of section 15 of Article XIII of the Constitution, and legislation enacted pursuant thereto. Such pro rata share shall be payable upon presentation of claim against any appropriation from the motor vehicle fuel fund for the support of the State Controller or the State Board of Equalization, as the case may be.

(g) To pay refunds as may be due on account of judgments for the return of license taxes illegally collected, as provided in section 16 of this act.

Counties to be Paid One-Third of Net Tax. One-third of all moneys in said "Motor vehicle fuel fund" after the biennial appropriations to the State Controller and the State Board of Equalization have been deducted and the refunds herein provided for shall have been paid, shall be paid to the counties as hereinafter provided.

Basis for Apportionment to Counties. Out of said appropriation, each county and city and county shall first be paid five thousand dollars for each quarter of a year. The balance remaining in said appropriation, after making said apportionment of five thousand dollars quarterly shall be apportioned to all of the counties and cities and counties of this State in the proportion that the registration of vehicles in each of such counties and cities and counties bears to the total number of vehicles registered in this State.

Counties' Share to be Used for Road Purposes. All such amounts so paid to the several counties shall be paid into a special road improvement fund. Such fund shall be expended by the county receiving it exclusively in the construction and maintenance of roads, bridges and culverts in each such county.

Supervisors May Authorize Expenditure of Money for Streets, and for Highways Outside of County. But the board of supervisors of any county may in its discretion expend any portion of such sums so received by such county in the construction, maintenance and repair of streets, bridges and culverts within those incorporated cities therein the legislative bodies of which by ordinance or resolution authorize such work of construction, maintenance and repair. The board of supervisors of any county, or city and county is hereby empowered to expend any portion of the amounts paid to the said county,

or city and county and deposited in the special road improvement fund or other road fund thereof, as herein in this section directed, in and for the construction of public highways outside of its corporate limits; provided, however, that the construction thereof is authorized by ordinance or resolution of the board of supervisors of the county, or city and county, in which said highway is to be constructed. Where such authorization is given, as herein provided, the board of supervisors of the county, or city and county desiring the said construction, may, through its own board, officers or commissions expend the amounts herein authorized to be expended, or may, by resolution of its board of supervisors, transfer said amounts to the account of the Highway Commission of the State of California or to the account of the Secretary of Agriculture of the United States, and may by said resolution specify and determine the route and type of construction of said highway, and the said amount thus transferred shall, if accepted by the said Highway Commission, or said Secretary of Agriculture, be expended for the purpose specified and determined in said resolution, and not otherwise.

In the event that any such county has not established such a road fund, its proportion of such fund shall be retained by the State until provision for such a road fund has been made, and it shall then be paid over to such county.

Time for Apportionment to Counties. In the months of January, April, July and October of each year, the Controller shall ascertain the gross amounts received and the net receipts remaining after deducting the amounts withdrawn for the support of the Controller and the Board of Equalization and the payment of the refunds for which provision is made in section

11 of this act during the preceding three months, and thereupon the Controller shall draw his warrant upon the "Motor vehicle fuel fund" in favor of each county in the State for the amount to which each such county is entitled. The Controller shall not draw such warrant in favor of any county which shall not have established such a road fund as is herein required or which shall be delinquent in its annual report to the State Department of Public Works as hereinafter required.

Report of Supervisors to Department of Public Works. The board of supervisors of each county shall make an annual report to the State Department of Public Works not later than three months after the close of the county's fiscal year upon forms to be provided by such department, showing the amount of moneys received from the "Motor vehicle fuel fund" during the preceding fiscal year and the disposition of said moneys giving such details as to the disposition of said moneys as may be required by said department. Whenever such report shall not have been duly filed in the manner and form herein provided for at or before the time herein specified, the State Controller shall not draw his warrant in favor of the treasurer of such county until such report has been filed.

State's Share to be Used for Highway Purposes. All moneys in the "Motor vehicle fuel fund" other than those hereinbefore appropriated, are hereby appropriated to and shall by the State Treasurer be paid into the "State highway fund," which fund is hereby created, and shall be allocated and expended by the State Department of Public Works, Division of Highways for the acquisition of rights of way for, or the construction, maintenance, repair, widening, resurfacing, reconstruction or other improvement of State highways, and for

the maintenance, repair, widening, resurfacing and reconstruction of roads and highways in State parks subject to the approval of the official or officials charged by law with the management and control of such parks and in the manner specified in that certain act entitled "An act to provide for the acquisition of rights of way for and the construction, maintenance and improvement of State highways, classifying the highways in the State system and allocating and directing the expenditure of funds for the construction, maintenance and improvement of State highways" passed at the forty-seventh session of the Legislature, as amended.

All money from said "State highway fund" shall be upon warrants drawn by the State Controller upon demands made by the Department of Public Works, Division of Highways, and allowed and audited as provided by the rules of the State Board of Control. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC. 13½. Notwithstanding the provisions of section 13 and in addition to the authority therein conferred for the expenditure of the funds therein mentioned the board of supervisors of any county, or city and county, may also in its discretion expend any portion of said sums so received by such county, or city and county, for the payment of any portion of the principal or interest of, or for the redemption or purchase at a discount of, or for transfer to the interest and sinking fund for the discharge and payment of, bonds of a special assessment district or districts within said county, city and county, or any incorporated city therein, for the payment of which special assessments (levied wholly or partly in accordance with the assessed value of lands) have been or are to be

levied, which bonds have been issued in payment of, or the proceeds of which have been used for the acquisition of rights of way for the opening, widening, straightening, extending of, establishing of, or for the construction, improvement or repair of streets, roads, highways, bridges or culverts within such county, or city and county, or any incorporated city therein.

Money to be expended only for county highway bonds. Before any such sums may be expended for the purpose provided in the next preceding paragraph the board of supervisors of any such county, or city and county, shall, by a resolution adopted by a four-fifths vote of the members thereof, determine that the streets, roads, highways, bridges or culverts for the acquisition of rights of way for which, or the construction, improvement or repair of which, as the case may be, said bonds were issued are of general county use. It is the intention of this provision that no such funds shall be expended for any of the purposes herein enumerated if the streets, roads, highways, bridges or culverts are of only local use.

Restrictions on use of money. The authority conferred upon the board of supervisors of any county, or city and county, in this section, shall apply only to, and be restricted to, an amount or amounts equal to twenty per centum of the said sums so received by any such county, or city and county.

Said authority is further limited to bonds which shall have been issued prior to the taking effect of this section, or shall be issued under any proceeding initiated prior to January 1, 1933. [*Statutes* 1933, *Ch.* 481; *in effect August* 21, 1933.]

SEC. 13a. **Revolving Funds.** The State Board of Equalization may, without at the time furnishing vouchers and item-

ized statements, draw from the "Fuel tax enforcement fund," a sum not to exceed five thousand dollars; and the Department of Public Works, Division of Highways, may, in like manner, draw five hundred thousand dollars from the "State highway fund." The sum or sums so drawn shall be used as a revolving fund where cash advances are necessary. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC. 14. Any person, firm, association or corporation or any officer or agent thereof failing to pay the license tax as herein provided, or violating any of the other provisions of this act, or unlawfully making any false statement, or concealing any material fact in any record, report, affidavit or claim provided for herein, shall be guilty of a misdemeanor, unless such act is by any other law of this State declared to be a felony, and upon conviction thereof shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

Revocation of License for Noncompliance With Act. The State Board of Equalization shall have power to revoke the license of any distributor, producer, or broker, refusing or neglecting to comply with the provisions of this act.

Licensee Notified of, and Allowed to Protest Revocation. Before revoking any license issued hereunder said board shall send notice by registered mail directed to said licensee at his last known address ordering him to show cause, before said board at Sacramento or such other place in this State as may be designated by said board, at a time not less than ten days after the mailing of such notice, why his license issued hereunder should not be revoked. Said board shall allow such distribu-

tor, producer or broker an opportunity to be heard in pursuance of such notice and thereafter shall have full power to revoke his license issued hereunder.

The State Board of Equalization is hereby authorized to pay out of the "Fuel tax enforcement fund" all expenses incurred in the prosecution before any court of this State of any person, firm, association or corporation charged with the violation of any of the provisions of this act. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC. 14*a*. Any person, firm, association or corporation, or any officer or agent thereof who, through false statement, trick or device, or otherwise, obtains motor vehicle fuel for export and fails to export the same, or any portion thereof, or causes said motor vehicle fuel or any thereof not to be exported, or who diverts said motor vehicle fuel or any thereof, or who causes to be diverted from interstate or foreign transit begun in this State, or who unlawfully returns said fuel or any thereof to this State and sells or uses said fuel or any thereof in this State or causes said fuel or any thereof to be used or sold in this state and fails to notify the distributor from whom such motor vehicle fuel was originally purchased of his act, and any distributor or other person who conspires with any person, firm, association or corporation, or any officer or agent thereof, to withhold from export, or divert from interstate or foreign transit begun in this State, or to return motor vehicle fuel to this State for sale or use so as to avoid any of the taxes imposed by this act, shall be guilty of a misdemeanor, unless such act is by any other law of this State declared to be a felony, and upon conviction thereof shall be punished by a fine of not less than five hundred dollars nor more than five thou-

sand dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. Each such shipment illegally diverted or illegally returned shall be construed a separate offense, and the unit of each shipment shall be the cargo of one vessel, or one railroad carload, or one automobile truck load, or such truck and trailer load, or one drum, or one barrel, or one case, or one can. [*Statutes* 1931, *p.* 118; *in effect March* 30, 1931.]

SEC. 15. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The Legislature hereby declares that it would have passed this act and each section, subsection, sentence, clause and phrase thereof irrespective of the fact that any one or more of the sections, subsections, sentences, clauses or phrases be declared unconstitutional. [*Original section; Statutes* 1923, *p.* 577.]

SEC. 16. No injunction or writ or mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State or against any officer thereof, to prevent or enjoin the collection under this act of any license tax assessed by the State Board of Equalization; but after payment of any such license tax under protest duly verified and setting forth the grounds of objection to the legality of such license tax, the distributor paying such license tax may bring an action against the State Treasurer in the superior court of the county of Sacramento for the recovery of the license tax so paid under protest. No such action may be instituted more than ninety days after the last day prescribed for the payment of such license tax without penalty, and failure to

bring suit within said ninety days shall constitute waiver of any and all demands against this State on account of alleged overpayment of license taxes hereunder. No grounds of illegality of the license tax shall be considered by the court other than those set forth in the protest filed at the time of the payment of the license tax. If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any license taxes due from the plaintiff under this act, and the balance of the judgment shall be refunded to the plaintiff. In any such judgments, interest shall be allowed at the rate of seven per cent per annum upon the amount of the license tax found to have been illegally collected from the date of payment thereof to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the State Board of Equalization.

Who May Obtain Judgment. In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any license tax paid hereunder, when such action is brought by or in the name of an assignee of the distributor paying said license tax, or by any person, company or corporation other than the person, company or corporation that has paid such license tax.

All acts and parts of acts inconsistent with the provisions of this act are hereby repealed. [*Statutes* 1933, *Chapter* 631; *in effect May* 29, 1933.]

SEC. 17. This act shall go into effect upon the thirtieth day of September, one thousand nine hundred twenty-three, provided there shall have been theretofore enacted that certain

act to be known and cited as the "California vehicle act" introduced in the forty-fifth session of the Legislature as Senate Bill No. 743. [*Original section; Statutes* 1923, *p.* 577.]

SEC. 18. All matters of procedure relating to refunds of taxes or the cancellation of any assessment levied under the provisions of this act shall be governed by the provision of section three thousand six hundred sixty-nine of the Political Code. [*Statutes* 1925, *p.* 661; *in effect July* 24, 1925.]

SEC. 19. This act shall be known as the "Motor vehicle fuel license tax act." "

Section 1056 of the Code of Civil Procedure of California, relating to surety companies qualified to write bonds as prescribed by the California Motor Vehicle Fuel Tax Law, is as follows:

"§ 1056. CORPORATIONS MAY BECOME SURETIES ON UNDERTAKINGS AND BONDS. In all cases where an undertaking or bond, with any number of sureties, is authorized or required by any provision of this code, or of any law of this state, any corporation with a paid up capital of not less than two hundred fifty thousand dollars, incorporated under the laws of this or any other state of the United States for the purpose of making, guaranteeing, or becoming a surety upon bonds or undertakings required or authorized by law, or which, by the laws of the state where it was originally incorporated has such power, and which shall have complied with all of the requirements of the law of this state regulating the formation or admission of these corporations to transact such business in this state, may become and shall be accepted as security or as sole and sufficient surety upon such undertaking or bond, and such corporate surety shall be subject to all the

liabilities and entitled to all the rights of natural persons' sureties; provided, that the insurance commissioner shall have the same jurisdiction and powers to examine the affairs of such corporations as he has in other cases; shall require them to file similar statements and issue to them a similar certificate. And whenever the liabilities of any such corporation shall exceed its assets, the insurance commissioner shall require the deficiency to be paid up in sixty days, and if it is not so paid up, then he shall issue a certificate showing the extent of such deficiency and he shall publish the same once a week for three weeks, in a daily San Francisco paper. And, until such deficiency is paid up, such company shall not do business in this state. In estimating the condition of any such company, the commissioner shall allow as assets only such as are allowed under existing laws at the time, and shall charge as liabilities, in addition to eighty per cent of the capital stock, all outstanding indebtedness of the company, and a premium reserve equal to fifty per centum of the premiums charged by said company on all risks then in force.—1933."